

NOT FOR PUBLICATION

NOV 03 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,)	No. 02-50640
)	
Plaintiff-Appellee,)	D.C. No. CR-02-01413-JTM
)	
v.)	MEMORANDUM*
)	
RONALD BRIAN OKITSU,)	
)	
Defendant-Appellant.)	
_____)	

Appeal from the United States District Court
for the Southern District of California
Jeffrey T. Miller, District Judge, Presiding

Submitted October 10, 2003**
Pasadena, California

Before: REINHARDT, FERNANDEZ, and RAWLINSON, Circuit Judges.

Ronald Brian Okitsu appeals his conviction and sentence for bringing an alien into this country without presentation and for financial gain. See 8 U.S.C.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

§ 1324(a)(2)(B)(ii)-(iii); 18 U.S.C. § 2. We affirm.

1. Okitsu claims that the whole indictment should fall because the Grand Jury was misinstructed. But we have previously declared that the selfsame instructions were not unconstitutional. See United States v. Marcucci, 299 F.3d 1156, 1159, 1164 (9th Cir. 2002); see also United States v. Cedano-Arellano, 332 F.3d 568, 573 (9th Cir. 2003). This panel is in no position to reconsider that decision. See Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001); Bell v. Hill, 190 F.3d 1089, 1092-93 (9th Cir. 1999).

2. Okitsu also claims that the prosecutor's argument regarding a lack of evidence to contradict that of the prosecution witnesses constituted misconduct. It did not. The argument did not call attention to Okitsu's failure to testify or imply that the prosecution did not have the burden of persuasion. See United States v. Mares, 940 F.2d 455, 461 (9th Cir. 1991); see also United States v. Cabrera, 201 F.3d 1243, 1246, 1249-50 (9th Cir. 2000). It simply pointed up the obvious weaknesses in Okitsu's defense. See United States v. Vaandering, 50 F.3d 696, 701-02 (9th Cir. 1995).

3. Okitsu finally asserts that the district court erred when it denied him a minor role adjustment. See USSG §3B1.2 (Nov. 2002). However, we cannot say that the district court erred when it determined that a minor role adjustment was

not called for on this record. See United States v. Hernandez-Franco, 189 F.3d 1151, 1160 (9th Cir. 1999); United States v. Villasenor-Cesar, 114 F.3d 970, 973 (9th Cir. 1997).

AFFIRMED.